

CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 213.

FIRST NATIONAL BANK OF BALTIMORE, PETITIONER,

vs.

WILLIAM H. STAAKE, TRUSTEE OF C. R. BAIRD & COMPANY, BANKRUPTS, ET AL.

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT.**

**PETITION FOR CERTIORARI FILED MARCH 25, 1905.
CERTIORARI AND RETURN FILED APRIL 18, 1905.**

(19,683.)

(19,683.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 213.

FIRST NATIONAL BANK OF BALTIMORE, PETITIONER,

vs.

WILLIAM H. STAAKE, TRUSTEE OF C. R. BAIRD & COMPANY, BANKRUPTS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT.

INDEX.

	Original.	Print.
Caption	a	1
Petition of First National Bank of Baltimore, Md., for review.	1	1
Transcript of record of district court.....	6	5
Petition of Wm. H. Staake, trustee	6	6
Exhibit "A"—Agreed statement of facts.....	9	8
Demurrer of First National Bank of Baltimore, Md., to petition of Wm. H. Staake, trustee	15	13
Answer of said bank to said petition	16	14
Answer of John N. M. Shimer, trustee, to said petition.	18	15
Opinion of the court.....	19	16
Decree of court	24	21
Clerk's certificate.....	26	22
Demurrer to petition.....	26	23
Answer	28	24
Docket entries	29	24
Opinion.....	30	25
Dissenting opinion.....	36	30
Judgment	37	31
Petition for a rehearing	39	31
Order denying a rehearing	51	39
Clerk's certificate.....	52	39
Return to writ of certiorari.....	53	40
Stipulation as to return to writ of certiorari	54	40
Writ of certiorari	55	41

a

Transcript of Record.

United States Circuit Court of Appeals, Fourth Circuit.

FIRST NATIONAL BANK OF BALTIMORE, Petitioner,	} No. 532.
<i>versus.</i>	
WILLIAM H. STAAKE, Trustee of C. R. Baird & Company, Bankrupt, <i>et al.</i> , Respondents.	

On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Western District of Virginia, at Lynchburg.

Petition Filed January 22nd, 1904.

Clerk's office, U.S. circuit court of appeals, fourth circuit. Henry T. Meloney, clerk, Richmond.

1 In the United States Circuit Court of Appeals, Fourth Circuit.

Petition for Review.

Filed January 22, 1904.

By FIRST NAT'L BANK OF BALTIMORE	}
<i>vs.</i>	
STAAKE, Trustee, <i>et als.</i>	

In re C. R. BAIRD, Trading as C. R. Baird & Co., Bankrupt. In Bankruptcy.

In re ROANOKE FURNACE COMPANY, Bankrupt. In Bankruptcy.

To the honorable judges of the United States circuit court of appeals for the fourth circuit:

Your petitioner, The First National Bank of Baltimore, Maryland, respectfully submits that it is aggrieved by that part of an order which was entered in the above styled proceedings on January 14th, 1904, by the district court of the United States for the western district of Virginia, sitting as a court of bankruptcy, whereby it was adjudged, ordered and decreed:

(1.) "That for reasons stated in a written opinion the demurrer of the attaching creditors to the petition of William H. Staake, trustee, be, and the same is hereby overruled.

(2.) * * * "That the rights acquired by the attachment proceedings in the hustings court of the city of Roanoke by the attaching creditors, to-wit: * * * The First National Bank of

Baltimore, Maryland, be preserved for the benefit of the estate of the said C. R. Baird, bankrupt, and that said petitioner, William H. Staake, trustee of the said estate, be, and he is hereby, subrogated to said rights, and authorized and empowered to enforce said attachment liens with like force and effect as the said attaching creditors might have done had not the bankruptcy proceedings intervened."

2 Your petitioner respectfully shows that the facts in this case were agreed between all the parties in interest by a writing dated the 25th day of February A. D., 1903, filed with the record. A summary of such of the facts as it is deemed necessary to submit to the court at this time and a statement of how the questions at issue were raised, are as follows:

On December 7th, 1899, Chester R. Baird, trading as C. R. Baird & Co., was the owner of certain real estate lying partly in the city of Roanoke and partly in the county of Roanoke, Virginia, which is known and designated as the West End Furnace property. That as of said date, he sold said property to the Roanoke Furnace Company, a corporation, and received from said furnace company all of the consideration to which he was entitled under said contract. This contract, however, was not recorded and no deed was at that time executed, though the Roanoke Furnace Company immediately took possession of the property.

On October 26th, 1900, the said Baird was indebted to the First National Bank of Baltimore in the sum of twelve thousand (\$12,000) dollars and interest; and as of said date it caused an attachment to be levied and thereby acquired a lien upon the West End Furnace property under and pursuant to the laws of the State of Virginia.

On November 5th, 1900, the said Baird under and pursuant to the contract above referred to, conveyed said property to the Roanoke Furnace Company, the said deed of conveyance being recorded on November 7th, 1900, and November 8th, 1900, in the proper offices of Roanoke city and county.

On November 24th, 1900, an involuntary petition in bankruptcy was filed against said Baird, in the district court of the United States for the eastern district of Pennsylvania, by certain other of his creditors. On December 29th, 1900, an involuntary petition in bankruptcy was filed against the Roanoke Furnace Company in said court.

On the 2nd day of January, 1901, the district court of the United States for the western district of Virginia, assumed ancillary jurisdiction of so much of said proceedings as pertained to or related to the property located in the State of Virginia.

On the 29th day of March, 1901, William H. Staake, was appointed trustee of the estate of C. R. Baird, bankrupt, and on the 27th day of June, 1901, John N. M. Shimer was appointed trustee of the estate of the Roanoke Furnace Company, bankrupt.

3 That the attachment which was levied by petitioner is a valid lien under the laws of the State of Virginia, on the

West End Furnace property, and is a present valid lien thereon prior to the rights of the Roanoke Furnace Company.

That the property known as the West End Furnace property by virtue of decrees entered in the above mentioned bankruptcy proceedings was exposed to sale and sold, but without prejudice to petitioner's lien, and that out of said proceeds of sale sufficient was retained, and is now held subject to the order of the court, to pay the full amount of petitioner's debt, principal, interest and costs. That subsequently a petition was filed in the district court of the United States for the western district of Virginia, in bankruptcy, by William H. Staake, Tr., wherein it was asked, *inter alia*, that the lien acquired by your petitioner upon the West End furnace property be declared void as to him, and be preserved by the court for his benefit as the trustee of C. R. Baird. To this petition, a demurrer and answer was filed, upon the hearing of which the portion of the order as hereinbefore complained of was entered.

Your petitioner prays the jurisdiction of this court under the provisions of the act of Congress approved July 1st, 1898, and as amended and re-enacted by an act approved February 5th, 1903, entitled, "An act to establish a uniform system of bankruptcy throughout the United States," whereby it was given jurisdiction—sec. 24*b*—to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within its jurisdiction.

Your petitioner respectfully represents that said district court erred in matters of law when it entered the portion of the decree, as hereinbefore set forth, and when said court decided and held:

1st. That an attachment which was and is a valid lien under the laws of the State of Virginia upon certain real estate which could not pass to the bankrupt debtor's trustee as a part of the estate of the bankrupt, the title to said real estate, both legal and equitable, having been transferred to a third party by a valid conveyance prior to the filing of a petition in bankruptcy against the debtor, is void under section 67*f* *quoad* the bankrupt debtor's trustee.

2nd. That the trustee of a bankrupt, under and by virtue of section 67*f*, should be subrogated to the rights of an attaching creditor in an attachment which is a lien upon the property of a third party, property to which the bankrupt had no title, either legal or equitable, property which the bankrupt could not have transferred and which could not have been levied upon and sold under judicial process against him prior to the filing of a petition in bankruptcy. That under said section, in the case at bar, assets are made available to the bankrupt's trustee other than such as he could acquire and hold under sec. 70*a*.

3rd. That under and by virtue of section 67*f*, a trustee of a bankrupt should be subrogated to the rights of the attaching creditor in an attachment which is a lien upon property which could not pass to the trustee as a part of the estate of the bankrupt, and should enforce such lien for the benefit of all the creditors, when without such subrogation the lien would not be annulled or the property affected

discharged therefrom under section 67f. In other words, that the trustee should be subrogated to the rights of the creditor in an attachment, the lien of which is valid.

4th. That a preference is created which will not be permitted by the bankrupt act, if one creditor receive the full payment of his debt, even though such payment be made out of an asset which did not belong to the bankrupt debtor and which cannot be subjected by his trustee for the benefit of all the creditors.

5th. That the court erred in overruling the demurrer of the attaching creditors to the petition of William H. Staake, trustee as aforesaid.

The agreed facts which were filed with the petition as a part thereof show that at the time of the suing out of said attachments the property levied on, so far as the creditors represented by William H. Staake, trustee, were concerned was not the property of C. R. Baird, but the property of the Roanoke Furnace Company. Said attachment became a lien on said property by virtue of the registry laws of the State of Virginia and not by virtue of the fact that said property was that of C. R. Baird, and the said petition did not disclose that the creditors represented by William H. Staake at the date of the filing of the petition in bankruptcy had any claim to or interest in said West End Furnace property. All that said creditors were entitled to was to have the property owned by the said Baird or such as is covered by section 70a of the bankrupt act, subjected to the payment of their debts, and it was error in the court to hold under the facts of the case at bar that the provisions of the bankrupt law applied.

6th. That said court erred in holding, as is provided in the second clause of the decree hereinbefore set forth, that the rights acquired by the attachment proceedings in the hustings court of the city of Roanoke by this petitioner, should be preserved for the benefit of said William H. Staake, trustee, or direct that he be subrogated to the rights of the petitioner under said attachment.

It is, therefore, submitted that the court erred in all of its findings hereinbefore mentioned, for the reasons hereinbefore stated and such other reasons as will be hereafter advanced upon the argument of this petition.

In tender consideration whereof, your petitioner prays this honorable court to superintend and revise in matter of law the said proceedings and findings of said district court; that it revise, reverse and annul that portion of the order of January 14th, 1904, as hereinabove set forth by which your petitioner is aggrieved, and that it enter or cause to be entered such order or orders as will secure to petitioner the rights which it is clearly entitled to under the law.

And your petitioner will, in duty bound, ever pray, &c.

FIRST NATIONAL BANK OF BALTIMORE,

By J. D. FERGUSON, Its President.

S. HAMILTON GRAVES,

For Petitioner.

Memorandum.

A certified copy of the above petition, with notice to respondent's attorney to answer, demur or move to dismiss said petition within fifteen days, was mailed to S. Griffin, Esq., January 22, 1904, as required by rule 36 bankruptcy.

HENRY T. MELONEY, CLK.

6

Transcript of Record.

Filed Feb. 3, 1904.

UNITED STATES OF AMERICA,)
Western District of Virginia. }

Pleas in the district court of the United States for the western district of Virginia, before the Honorable Henry C. McDowell, judge of the district court of the United States for the western district of Virginia, on Thursday, the 14th day of January, anno Domini, and in the 128th year of the Independence of the United States.

In re C. R. BAIRD, Trading as C. R. Baird & Co., Bankrupt.

In re ROANOKE FURNACE COMPANY, Bankrupt.

In Bankruptcy.

WM. H. STAAKE, Trustee,

versus

FIRST NATIONAL BANK OF BALTIMORE, MD., and
Others.

} On Petition.

Be it remembered, that heretofore, to-wit: on the 27th day of February, 1903, in the clerk's office of the said district court of the United States for the western district of Virginia, came the said William H. Staake, trustee, by counsel, and filed his petition in the matters of C. R. Baird, trading as C. R. Baird & Co., and the Roanoke Furnace Company, bankrupts, which petition is in the words and figures following, to-wit:

Petition of William H. Staake, Trustee.

Filed Feb'y 27th, 1903.

In the District Court of the United States for the Western District of Virginia.

In the Matter of CHESTER R. BAIRD, Trading as C. R. Baird & Company, Bankrupt. In Bankruptcy.

In the Matter of ROANOKE FURNACE COMPANY, Bankrupt. In Bankruptcy.

To the Honorable Henry Clay McDowell, judge of the said court :

7 The petition of William H. Staake, trustee of the estate of Chester R. Baird, trading as C. R. Baird & Company, bankrupt, respectfully represents :

1. That your petitioner is the trustee of the estate of Chester R. Baird, trading as C. R. Baird & Company, bankrupt, having been appointed and qualified as such in proceedings pending in the district court of the United States for the eastern district of Pennsylvania, whereof this honorable court has assumed ancillary jurisdiction.

2. That your petitioner has filed against the estate of Roanoke Furnace Company, in proceedings likewise pending in the district court of the United States for the eastern district of Pennsylvania, whereof this honorable court has likewise assumed ancillary jurisdiction, his claim in the sum of \$158,757.55. This amount includes \$85,000 due by Chester R. Baird to Robert E. Tod in part payment for the Roanoke or West End Furnace property ; the Roanoke Furnace Company assumed payment of this as part of the consideration of the conveyance to it by Chester R. Baird of the said premises, but failed to carry out its agreement, and Baird was obliged to pay the same to Tod.

3. That the said premises were attached by sundry creditors of said Baird, as and for his property, by reason of the non-recording of the deed from said Baird to the Roanoke Furnace Company. The facts respecting the conveyance of the said premises, the said attachments, the insolvency of Baird and of Roanoke Furnace Company, and the like, are set forth at length in the agreed statements of fact hereto attached, marked Exhibit A, and made part hereof.

4. That your petitioner, by decree of the district court of the United States for the eastern district of Pennsylvania, was ordered to have himself subrogated to the rights of the aforesaid attaching creditors, said decree being as follows :

"And now, to-wit, this 3rd day of May, A. D. 1901, upon consideration of the foregoing petition and on motion of John Dickey, Jr., Hazard Dickson and Samuel W. Cooper, Esqs., attorneys for William H. Staake, trustee of the estate of Chester R. Baird, trading as

C. R. Baird & Company, it is ordered, adjudged and decreed that William H. Staake, trustee as aforesaid, be and he hereby is authorized and directed to proceed in an appropriated manner to have himself subrogated to the rights of the holders of the liens of attaching creditors of Chester R. Baird, trading as C. R. Baird & Company, who have levied by foreign attachment and otherwise upon the premises contracted to be conveyed to the said Baird by Robert E. Tod, and empowered, when thus subrogated, to enforce the same in his name as trustee with like force and effect as the holders of the said liens might have done had not bankruptcy proceedings intervened; but the said liens shall in that event be subordinated to the receiver's certificates authorized by the order of this court on the 30th day of March, 1901, as amended by the further order made on the 19th day of April, 1901, *In re Roanoke Furnace Company, bankrupt.*"

The receiver's certificates mentioned in said decree have now all been discharged.

Your petitioner therefore shows that under the laws of Virginia, the rights of the aforesaid attaching creditors are superior to those of Roanoke Furnace Company, bankrupt, and that *quoad* them the property attached is the property of Chester R. Baird, now bankrupt; but that by reason of the insolvency of Chester R. Baird at the time of the levying of the said attachments, these attachments (having been levied within four months of the filing of the petition praying that he be adjudged a bankrupt) are to be deemed null and void under the provisions of the bankruptcy act of 1898, unless the court shall order that they be preserved for the benefit of his estate.

Your petitioner further shows that it would be to the benefit of the estate whereof he is trustee thus to preserve the said attachments as already directed by the district court of the United States for the eastern district of Pennsylvania, the court of primary jurisdiction.

Your petitioner therefore prays that your honorable court will assume jurisdiction of the matter, and that the attachments aforesaid be decreed null and void as regards the present plaintiffs, but that they be preserved for the benefit of your petitioner.

Your petitioner further prays that if this honorable court declines to assume jurisdiction and remits the matter to the courts out of which the said attachments issued, this honorable court will nevertheless order these attachments preserved for the benefit of the estate whereof your petitioner is trustee, and direct your petitioner to proceed to have himself subrogated to the rights of the holders of the said attachments, and empower him to perfect and enforce the same in his name as trustee.

And your petitioner will ever pray.

WILLIAM H. STAAKE,
Trustee for, &c.

HAZARD DICKSON.
SAM'L GRIFFIN, P. Q.
Affidavits waived.

Agreed Statement of Facts, &c.

EXHIBIT A WITH PETITION OF STAAKE, TRUSTEE.

In the Matter of C. R. BAIRD & Co. and THE ROANOKE FURNACE COMPANY, Bankrupts, and THE FIRST NATIONAL BANK OF BALTIMORE, MARYLAND.

In order to avoid the expense and delay of taking testimony and to have it judicially ascertained which court, State or Federal, has jurisdiction, it is mutually agreed between William H. Staake, trustee of the estate of C. R. Baird, trading as C. R. Baird & Company; John N. M. Shimer, trustee of the estate of the Roanoke Furnace Company and the First National Bank of Baltimore, Maryland, as follows:

1. That as of October 22nd, 1900, Chester R. Baird, was indebted to the First National Bank of Baltimore, Maryland, in the sum of twelve thousand dollars, (\$12,000), with interest thereon at six per cent., from said date, and a protest fee of \$2.31; that on October 26, 1900, said bank filed in the clerk's office of the hustings court for the city of Roanoke, Virginia, on the chancery side thereof, a bill of complaint, wherein it was plaintiff, and Chester R. Baird, The Roanoke Furnace Company *et als.* were defendants; that upon said bill and affidavits then filed it caused an attachment to be issued against C. R. Baird and the same was on the 26th day of October, 1900, levied on the property of said C. R. Baird, in the city of Roanoke, Va., and upon the real estate and fixtures thereto belonging, known as the West End Furnace property; that said attachment was also, on said date, served on Charles E. Hatch, treasurer of the Roanoke Furnace Company, and on one Frank F. Amsden, said Hatch and Amsden being in possession of the attached property; that said bank on said date filed in the clerk's office of said court a *lis pendens* as provided by the statutes of Virginia, and the same was then recorded in Deed Book No. 125, page 89, that said bank also caused a copy of said attachment to be directed to the sheriff of Roanoke county, Virginia, which said attachment was by said sheriff levied on October 30th, 1900, on certain real estate in said county, a portion of which was known as the West End Furnace property, and served upon George Ray and J. G. Manning, who had said property in possession; that a *lis pendens*, as provided by the statutes of Virginia, was on said date filed in said clerk's office of said county, and recorded in Deed Book —, page —; that on January 10th, 1901, the said First National Bank of Baltimore was

10 upon the prayer of T. L. Woodruff and others enjoined and restrained by the district court of the United States for the western district of Virginia, from prosecuting its said attachment proceedings above mentioned; and that said injunction was not dissolved until the — day of December, 1902.

2. That a petition praying that Chester R. Baird, trading as C. R. Baird & Company, be adjudged an involuntary bankrupt was filed in the district court of the United States for the eastern district of Pennsylvania, on the 24th day of December, A. D. 1900, and a further petition was filed in said court on the 26th day of December, 1900, in accordance with the prayer of which John N. M. Shimer and William H. Staake were appointed receivers of the estate of the said Chester R. Baird, trading as C. R. Baird & Co., and such receivers duly qualified and entered upon the duties of their office.

That the said bank filed no attachment bond and neither the sergeant nor the sheriff took possession of the attached property.

3. That a petition was filed in the district court of the United States for the western district of Virginia, on the 2nd day of January, 1901, praying among other things that said court assume ancillary jurisdiction of the cause and appoint receivers of the estate of the said alleged bankrupt, found within the territorial jurisdiction of said court, and in pursuance thereof the said John N. M. Shimer and William H. Staake were appointed receivers of said estate, who thereupon qualified and entered upon the duties of their office, and assumed possession of said estate.

4. That Chester R. Baird, trading as C. R. Baird & Co., was on February 18th, 1901, by the district court of the United States for the eastern district of Pennsylvania duly adjudged a bankrupt and on the 29th day of March, 1901, William H. Staake was appointed trustee of the estate, who thereupon qualified and entered upon the discharge of his duties and took possession of the estate of the bankrupt, as set out in the inventory and appraisal filed in the record in said cause.

5. That a petition praying that the Roanoke Furnace Company be adjudged an involuntary bankrupt was filed in the district court of the United States for the eastern district of Pennsylvania, on December 29th, 1900, and the said court in said proceedings, in accordance with the prayer of the *the* petition filed therein, appointed William H. Staake and John N. M. Shimer receivers of the estate of the said Roanoke Furnace Company, who duly qualified as such and entered upon the duties of their office.

11 6. That a petition was filed in the district court of the United States for the western district of Virginia, on the 2nd day of January, 1901, praying, among other things, that the court assume ancillary jurisdiction of the matter of the Roanoke Furnace Company, alleged bankrupt, and appoint receivers of the estate of the said alleged bankrupt found within the territorial jurisdiction of said court; and in pursuance thereof the said William H. Staake and John N. M. Shimer were appointed receivers of the said estate, and qualified as such and entered upon the duties of their office, and assumed possession of the said estate.

7. That pursuant to the prayer of the petition filed on the said 29th day of December, 1900, the said Roanoke Furnace Company was adjudged a bankrupt on the 27th day of March, 1901, and sub-

sequently, to-wit: on the 27th day of June, 1901, the said John N. M. Shimer was appointed trustee of its estate, and duly qualified as such, and entered upon the duties of his office; and took possession of the estate of the said bankrupt found within the territorial jurisdiction of the district court of the United States for the western district of Virginia.

8. That said Chester R. Baird by written contract made and entered into the 7th day of December, 1899, (but said contract was not recorded) sold to the Roanoke Furnace Company a certain furnace property lying partly in the city of Roanoke, and partly in the county of Roanoke, Virginia, commonly known as the West End Furnace property, and by deed of conveyance dated the 5th day of November, 1900, recorded in the clerk's office of the corporation court for the city of Roanoke, Virginia, on the 7th day of November, 1900, in Deed Book 125, page 149, and in the clerk's office of the county court of Roanoke county on the 8th day of November, 1900, in Deed Book 22, page 402, conveyed the said land and appurtenances known as the West End Furnace property, (being the same property which was attached by the First National Bank of Baltimore, Md., as hereinbefore stated) to the said Roanoke Furnace Company for the consideration therein named. That inasmuch as neither the contract nor deed from C. R. Baird to the Roanoke Furnace Company had been recorded at the time of the levying of the said attachment and filing of *lis pendens* by said bank, the property conveyed by such deed is to be deemed and taken under the laws of the State of Virginia to be the property of the said C. R.

12 Baird, *quoad* the said attachment and no further; and that said attachment was a valid lien under the laws of Virginia on the property levied on, as of the dates of said levies respectively, and is a present valid lien thereon, prior to the rights of the Roanoke Furnace Company, unless and except the same was made void by the bankruptcy act of 1898.

9. That both the said Baird, trading as aforesaid, and Roanoke Furnace Company were insolvent at the time of suing out and levying of the said attachment; that the deed of November 5th, 1900, from said Baird to the Roanoke Furnace Company was a valid conveyance to a purchaser in good faith, for a then fair consideration, and was not affected by the bankruptcy proceedings hereinbefore mentioned. That the consideration specified in said deed is as follows:

"That in consideration of the issuing and delivering of certain shares of the capital stock to the amount of \$500,000.00 of the said Roanoke Furnace Company, in pursuance of a certain agreement between the parties hereto, the receipt heretofore of the certificates for which shares is hereby formally acknowledged" * * * "It is expressly understood and agreed, however, that this conveyance has been made subject to the payment by the Roanoke Furnace Company of the *balance* of the purchase money due, or to become due, to Robert E. Tod on the land of which the hereby granted

premises are a part, the payment of which balance of purchase money has been assumed by the said Roanoke Furnace Company."

That, as of November 5th, 1900, the amount due Robert E. Tod was something over \$40,000.00, which amount was subsequently paid out of the proceeds from a sale of the property of the Roanoke Furnace Company.

10. That under and by virtue of decrees entered July 19th, 1902, by the district court of the United States for the eastern district of Pennsylvania, and subsequently entered in the ancillary proceedings in the district court of the United States for the western district of Virginia, said trustees exposed to sale, and sold the property located in the State of Virginia, known as West End Furnace property, and other property, that such sale was made without prejudice to the attachment of the said bank, and that such sale was confirmed by decrees entered by the aforesaid court, being entered in the ancillary proceedings in the western district of Virginia, on the 23rd day of August, 1902; that in each of said decrees it is provided as follows:

13 "It is further ordered, adjudged and decreed that out of the purchase money aforesaid, the said trustees deposit to their joint credit, in the Philadelphia national bank, the sum of \$42,500, to provide for the payment of the amounts which may be found to be due upon the following attachments, issuing out of the hustings court for the city of Roanoke, to-wit:

Plaintiff.	Amount.	Interest from.
First Nat. Bank of Baltimore	\$12,000.	Oct. 22, 1900.

The said attachments, having been levied upon certain of the assets aforesaid as and for the property of Chester R. Baird, because of the non-recording of the deed therefor from him to the Roanoke Furnace Company, are hereby *specifically* charged upon the said fund as deposited, and the same shall be held to await the adjudication by a court of competent jurisdiction (a) of the validity of the said attachments as present liens upon the property aforesaid, and of the amount due thereon, and (b) of the person or persons (if any) entitled to enforce them."

11. That the proceeds from the sale of the property which was conveyed by the deed of November 5th, 1900, from C. R. Baird to the Roanoke Furnace Co. were not only sufficient to pay off and discharge all liens thereon prior to that of the First National Bank of Baltimore, but were also sufficient to pay off and discharge the lien of said bank, as evidenced by said attachment, principal, interest and costs.

That a sufficient part of the proceeds of sale from said property to pay off the amount due the First National Bank of Baltimore is now in the hands of said trustees under the last decrees aforesaid.

That the balance due said bank, exclusive of the costs incurred in the hustings court, is \$8,152.06 with interest thereon at six per cent.

from the 11th day of November, 1902, as is shown by the statement hereto attached, as a part hereof, marked "Exhibit A."

12. The question of what court, State or Federal, has prior jurisdiction to pass upon and enforce said attachment shall not be affected either by the fact of a sale's having been made of the attached property by order of the Federal court, or the fact that the proceeds from such sale, etc., now held by the trustees aforesaid under and pursuant to decrees of said Federal court, but said question of jurisdiction shall be submitted to the district court of the United States for the western district of Virginia, in the ancillary proceedings in the matter of C. R. Baird & Co., bankrupt, and the Roanoke Furnace Company, bankrupt, as though the attached property had not

14 been sold, it being expressly understood that said bank contends, and by this agreement does not waive its contention, that as to its said attachment, and all questions pertaining thereto, the hustings court of the city of Roanoke has exclusive jurisdiction.

Should the said district court of the United States for the western district of Virginia, when determining said questions of jurisdiction, establish its own prior jurisdiction, then the question whether William H. Staake, trustee of the estate of Chester R. Baird, trading as C. R. Baird & Co., or the First National Bank of Baltimore, or neither of them, is entitled to the benefit of such attachment lien, is to be decided by said court on the facts herein agreed, and if said court shall establish the prior jurisdiction of the hustings court for the city of Roanoke, Virginia, then and in that event the said William H. Staake and John N. M. Shimer, trustees as aforesaid, will enter an appearance in the chancery cause pending in said hustings court, the short style of which is the First National Bank of Baltimore vs. C. R. Baird *et als.*, and more particularly set forth in sub-division 1 of this agreement.

And thereupon the said hustings court shall make and enter such orders and decrees as may to it seem proper upon said facts herein agreed, but this agreement shall not prejudice the rights of either party hereto to take an appeal from any decree that may be entered, at either the Federal or State court, which said party would have the right to take if this signature had not been made.

Witness the signatures of the parties hereto, this the 25th day of February, A. D., 1903.

WILLIAM H. STAAKE,
Trustee of the Estate of C. R. Baird, Trading as
C. R. Baird & Company, Bankrupt.
JOHN N. M. SHIMER,
Trustee of the Estate of the Roanoke
Furnace Company, Bankrupt.
FIRST NAT'L BANK OF BALTO.,
By J. D. FERGUSON, President.

15 Demurrer of First National Bank of Baltimore.

Filed Feb. 27th, 1903.

In the District Court of the United States for the Western District of Virginia.

In the Matter of CHESTER R. BAIRD, Trading as C. R. Baird & Company, Bankrupt. In Bankruptcy.

The Demurrer of The First National Bank of Baltimore, Maryland, Defendant, to a Petition Filed Against it *et als.* by William H. Staake, Trustee for said Estate.

To the Hon. Henry Clay McDowell, judge of said court :

This defendant, by protestation, not confessing any of all of the matters and things in the petitioner's said petition contained, to be true, in such manner and form as the same are therein set forth and alleged, doth demur to said petition, and for cause of demurrer, sheweth :

1. Said petition, with the exhibits therewith filed, does not set forth or show such a state of facts as will give to this court jurisdiction over the property attached or to hear and determine any questions pertaining thereto.

2. The allegations contained in said petition, together with the facts and statements contained in the exhibit therewith filed as a part thereof, does not under the bankruptcy act of 1898 entitle said complainant to the relief prayed for ; that is, that the attachment of this defendant be decreed null and void as to it, but that the same be preserved for the benefit of said petitioner.

Wherefore, and for divers other good causes of demurrer appearing in the said petition, this defendant doth demur thereto, and humbly demands the judgment of this court, whether it shall be compelled to make any further or other answer to the said petition, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

FIRST NATIONAL BANK OF BALTIMORE,
By COUNSEL.

S. HAMILTON GRAVES, P. Q.

Affidavits waived.

Filed Febr'y 27th, 1903.

In the District Court of the United States for the Western District of Virginia.

In the Matter of CHESTER R. BAIRD, Trading as C. R. Baird & Co.,
Bankrupt. In Bankruptcy.

The Answer of the First National Bank of Baltimore, Maryland, to the Petition of William H. Staake, Trustee of Chester R. Baird, Trading as C. R. Baird & Co.

To the Honorable Henry Clay McDowell, judge of said court :

1. This respondent admits the allegations of section " 1 " of said petition.

2. This respondent for answer to the statements and allegations contained in section " 2 " of said petition, says : That it is not a party to the bankruptcy proceedings which are pending in the eastern district of Pennsylvania, consequently, it is not aware what amount of claims has been filed by said petitioner against the Roanoke Furnace Company ; that it may be true that it has filed a claim for the sum of \$158,757.55, as alleged, but this respondent emphatically denies that if there is such claim filed, that \$85,000, or any part thereof, is due as unpaid purchase money on the property sold and conveyed by Chester R. Baird by deed of November 5th, 1900, to the Roanoke Furnace Company ; and relies upon the statement of facts agreed, filed as a part of said petition.

3. This respondent admits that the allegations contained in section " 3 " of said petition are true.

4. This respondent does not admit that a decree was entered, as is set forth in subdivision " 4 " of said petition, whereby the said William H. Staake, trustee, was authorized to proceed in a proper manner to have himself subrogated, etc. This respondent is not a party to said suit, has no knowledge of and is not bound by any order therein.

This respondent admits that the receiver's certificates mentioned in said petition have been paid off and discharged, and alleges that the same were sold when issued and the proceeds therefrom
17 applied to the balance due Robert E. Tod on the purchase price of the property conveyed by Baird to the Roanoke Furnace Company, and further alleges that said receiver's certificates were subsequently paid off and discharged out of the proceeds from a sale of said property.

This respondent, furthering answering, most emphatically denies that the insolvency of Chester R. Baird, at the time of the levying of its attachment against the Roanoke Furnace Company, is to the

prejudice of said attachment, or that the same is null and void under the bankruptcy act of 1898, and most emphatically denies the right of this court to enter an order preserving said attachment for the benefit of said petitioner, but alleges and charges that this respondent is entitled to the benefit of said attachment, and said property, when sold, having brought sufficient, not only to pay all liens thereon which were prior to said attachment, but also sufficient to pay said attachment, that this respondent is entitled to have the court enter an order directing that the amount unpaid under said attachment, should be paid to this respondent.

This respondent, further answering, says that it denies each and every allegation in said petition contained, which is not herein specifically admitted, unless and except the same be supported by the agreed statement of facts filed with said petition.

This respondent denies that the court of bankruptcy has jurisdiction to pass upon the question raised by said petition, and this respondent by answering does not waive its right to object to said jurisdiction. This respondent, in the event the court should determine that it has jurisdiction, then and in that event it prays that an order be entered directing the payment to it of the balance due on its said attachment.

FIRST NATIONAL BANK OF BALTIMORE,
By COUNSEL.

S. HAMILTON GRAVES, P. Q.

Affidavit waived.

18

Answer of John N. M. Shimer, Trustee.

Filed Feb'y 27th, 1903.

In the District Court of the United States for the Western District of Virginia.

In the Matter of CHESTER R. BAIRD, Trading as C. R. Baird & Company, Bankrupt. In Bankruptcy.

In the Matter of ROANOKE FURNACE COMPANY, Bankrupt. In Bankruptcy.

Answer of John N. M. Shimer, trustee of the estate of Roanoke Furnace Company, bankrupt, to petition of William H. Staake, trustee of the estate of Chester R. Baird, trading as C. R. Baird & Company, bankrupt.

To the Honorable Henry Clay McDowell, judge of said court :

1. Your respondent is the trustee of the estate of Roanoke Furnace Company, bankrupt, having been appointed and qualified as such in proceedings pending in the district court of the United States for

the eastern district of Pennsylvania, whereof this honorable court has assumed ancillary jurisdiction.

2. Your respondent admits the averments contained in said petition.

3. Your respondent shows that the attachments should be deemed null and void as respects the rights of the present plaintiffs, but that to continue such attachments for the benefit of the trustee of the estate of Chester R. Baird, trading as C. R. Baird & Company, bankrupt, without more, would have the effect of enabling the said trustee to enforce these claims of large amounts against this estate, in addition to the claim he has already filed as set forth in the petition.

Your respondent therefore respectfully suggests that if the attachments thus be continued, the petitioner be required to abate his said claim filed by the amount of the said attachments.

JOHN S. M. SHIMER,

Trustee for, &c.

Affidavit waived.

19

Opinion of the Court.

Filed Jan'y 14th, 1904.

United States District Court, Western District of Virginia.

In re C. R. BAIRD, Bankrupt,
and

In re ROANOKE FURNACE COMPANY, Bankrupt.

C. R. Baird, who did business under the name of C. R. Baird & Co., was the owner of certain real estate situated in this district, consisting of (1) the West End Furnace property; (2) certain mines, houses, rights of way &c., and (3) a rolling mill.

On December 7th, 1899, Baird, by written contract, sold the Furnace property to the Roanoke Furnace Company, in consideration of the issue to Baird of certain shares of the vendee's capital stock and the assumption by the vendee of a purchase money debt owing on the furnace by Baird to R. E. Tod. This contract was never recorded. On November 5, 1900, Baird executed and delivered to the Roanoke Furnace Company a deed in pursuance of the above mentioned contract, conveying the furnace property, which deed was forthwith recorded.

On October 13, 1900, Baird conveyed to the Roanoke Furnace Company the mines, houses, &c., but these deeds were not recorded up to the time that the petition in bankruptcy against Baird, hereafter to be mentioned, was filed.

The title to the rolling mill remained in Baird.

Between October 12th and 31st, 1900, at which time Baird was

insolvent, some of Baird's creditors sued out from the corporation court of the city of Roanoke, Virginia, attachments which were levied on all three of the above mentioned properties.

On December 24, 1900, other of Baird's creditors filed in the district court for the eastern district of Pennsylvania a petition in bankruptcy against him. In due course that court adjudicated Baird a bankrupt. Early in the course of this proceeding, ancillary jurisdiction was taken of the cause by this court.

On December 29, 1900, an involuntary petition against the Roanoke Furnace Company was filed in the said Pennsylvania court, followed by an adjudication. Ancillary jurisdiction of this cause was also taken by this court.

All of the above mentioned properties have been sold by order of court and the proceeds are deposited to the joint credit of
20 Staake, trustee of Baird's estate, and Shimer, trustee of the furnace company estate, to await the determination of the questions hereinafter discussed.

By the registry statutes of this State unrecorded contracts of sale and conveyances of real estate are void as to, at least, lien creditors.

The questions here are presented by a petition filed by Staake, trustee, praying that the attachments above mentioned be declared void as regards the creditors who sued them out, but preserved for the benefit of Baird's estate; by a demurrer to this petition filed by the attaching creditors; by an answer to the petition filed by Shimer, trustee of the furnace company estate, praying that if the benefit of the attachments be given to the trustee of Baird's estate he be required to correspondly abate his claim against the furnace company estate; and by a supplemental answer by Shimer, trustee.

At the hearing all objections to the jurisdiction of this court were withdrawn, and jurisdiction is taken by express consent of all parties.

The demurrer to the petition is intended to raise merely the question as to whether the trustee of Baird's estate or the attaching creditors shall have the benefit of the attachments.

By 67f of the bankrupt law, all attachments obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt; and the property affected by the attachment shall be deemed wholly discharged and released from the same, and shall pass to the trustee as part of the estate of the bankrupt, unless the court shall on due notice order that the right under such attachment shall be preserved for the benefit of the estate. In the case at bar the attachments were obtained through legal proceedings against Baird, within four months of the filing of the petition against him, and he was insolvent at the time. The language of this section so exactly fits the case we have here that some cogent reason must be found before we can properly hold that it does not apply.

Counsel for the attaching creditors, in an unusually excellent

argument, take the position that the case at bar is not within the intent of the bankrupt law. They argue that it is so unjust and inequitable to take from the attaching creditors the fruits of their diligence and give them to all creditors pro rata, that Congress could not have intended the act to apply in a case such as we have here.

21 Nevertheless, counsel for these creditors necessarily admit that if Baird had never conveyed the furnace, or if his grantee had never recorded the deed, or if Baird had made a fraudulent conveyance, the act plainly takes from the attaching creditors the fruits of their diligence and gives them to all the creditors pro rata. The argument that the law is unjust or inequitable is certainly as strong in any of the three supposed cases as in the case at bar. While the State law gives to diligent creditors who attach a priority of payment, a preference, over those who do not attach, it is beyond dispute that the intent of the bankrupt law (except as to rights gained more than four months before the filing of the petition in bankruptcy) is just the reverse. The intent of the latter, except as aforesaid, is to prorate all available assets and to prevent any priority of payment being obtained by any creditor within the four months, whether by consent of the debtor or by the diligence of the creditor. Such being the intent of the law, it seems to me that the argument based on the supposed injustice of the act as applied to case at bar is not of weight. Such being the intent of the law, it would be surprising if Congress had omitted to provide for the not uncommon state of facts which we have here. And, as above remarked, the language of 677 seems entirely adapted to the case we have here, as well as to other possible cases. In cases where the title to the attached property remains in the bankrupt, the liens of attaching creditors are simply annulled and the proceeds of the property are divided pro rata among all the creditors. In cases where the bankrupt has made a fraudulent conveyance, this deed is by proper proceedings set aside, the attachments are annulled and the proceeds of the property are prorated among all the creditors. In cases where the bankrupt makes a valid conveyance, or where his fraudulent vendee makes a valid conveyance, the purpose of the law is worked out by preserving and enforcing the liens of the attaching creditors for the pro rata benefit of all the creditors.

It is further argued that the case at bar is not within the intent of the act, because the right here contended for by the trustee is not mentioned in section 70a of the act. This argument does not seem to me to be of force. Section 70a is an enumeration of those properties the title to which passes to the trustee by operation of law. The right here asked for by the trustee can be given him only by order of court. It would have been inconsistent, even absurd, to have provided in 70a that the rights of attaching creditors, in a case such as we have here, shall vest in the trustee by operation of law, when it had been provided in 677 that such rights should be vested in the trustee by order of court.

22 It was further argued that the power to preserve and enforce liens for the benefit of all the creditors is given only as to liens that may be annulled under 67f; that only liens which give a preference are thus to be annulled, and that the liens here do not give a preference. While the argument is ingenious, I cannot assent to its soundness. If the attaching creditors are allowed to have the exclusive benefit of their liens, I do not see why they are not in effect allowed a preference. In such event they will be paid in full, while the other creditors will receive only a small proportion of their claims. Again, 67f is not confined to liens that create a preference. Its language expressly embraces all liens obtained as were the liens in the case at bar.

Considerable effort was expended in argument on the proposition that an unrecorded contract of sale, or deed, is made void by the Virginia statutes only as to lien creditors, and that, even if there were doubt about this as a legal proposition, clause 9 of the agreed facts in effect so states. I see no necessity of discussing these questions. If it were admitted that the right contended for by the trustee had to be found in 70a before such right could be given him, this point might be of considerable interest. But, as above stated, this right could not properly have been mentioned in 70a. The power of the court, and, indeed, its duty, to take away from the attaching creditors the benefit of their liens and give it to the trustee is found specifically in 67f. To thus construe this section is in line with the undoubted policy of the act; and its language is so sweeping and general that I am constrained to believe that had Congress not intended such cases as we have here to fall within its purview, some specific provision would have been made excepting such cases.

So far as this branch of the case is concerned, I am of opinion that an order should be made subrogating the trustee to the rights of the attaching creditors in the fund derived from the sale of the furnace property.

By request of counsel for the attaching creditors, and as the questions have not been argued, I do not now express an opinion on the questions presented by the answer and supplemental answer of Shimer, trustee.

Since the foregoing opinion was sent to counsel a petition has been filed by counsel for certain of the attaching creditors, praying that an allowance be made to counsel out of the fund now under the control of the court. Staake, trustee, demurred to the petition.

23 The fund in question would not exist but for the services of counsel. Had valid attachments not been levied, the property would have passed to the trustee of the Roanoke Furnace Company. Under such circumstances, equity treats the fund as charged with the claims of counsel for a reasonable allowance. I do not find any provision of the bankrupt act which deals with this question, nor any provision which seems to me to debar such an allowance. The fund should, I think, be treated as having come under the control of this court subject to this charge.

In making such allowance the court is not distributing the bankrupt's estate; but is directing the payment of a prior lien or charge on the fund, and only the balance left after such payment can properly be treated as the estate of the bankrupt.

Having announced to counsel that I would overrule the demurrer, an answer to the petition has been filed by the trustee.

The authorities cited in the answer do not seem to me to hold that a reasonable allowance would be improper under the circumstances of this case. In support of the reasonableness of the amounts prayed for in the petition, sundry depositions of members of the bar have been taken. On a question of fact the court is bound by the weight of the testimony. But in this case the question of fact is as to what the services of counsel were, and as to this there is no dispute. The question as to what is a reasonable allowance for such service is one on which the opinions of members of the bar can properly have only advisory force. It is the duty of the court to decide what sum is reasonable, and this duty can not be shifted to expert witnesses. Out of deference to the opinions of the members of the bar who have testified, I make the allowances somewhat larger than I should have done had the question been submitted without these depositions; but I cannot allow the sums prayed for. It appears that the minimum fee allowed by the rules of the Roanoke Bar Association is 10 % on the first \$1,000 and 5 % on the balance. This it is said is the scale for collections made without suit. All things considered, I have concluded that ten per cent. of the first \$5,000 and 5 % of the next \$5,000 and three per cent. of the balance is as much as is reasonable here. Especially so as I am satisfied that very few of the bar of this State (where fees are not extremely high), would decline to do the work that was done here for these fees.

The chief item of labor in the services of counsel was the title examination necessary to learn what real estate could be attached; but this was done only once, at the most, by each of the
24 counsel. The allowances, therefore, should be computed on the aggregate of the claims represented by each firm or individual.

The order may direct that Messrs. Scott & Staples be paid ten per cent. of the first \$5,000 and five per cent. of the balance, if any, of the aggregate of principal and interest of the claims of Huff, Andrews & Moyler Company; Nelson & Myers; Smith & King; Castner, Curran & Bullitt, and Central Manufacturing Company.

That A. B. Coleman, Esq., be paid ten per cent. of the aggregate of principal and interest of the claims of Fairfax & Bell and Standard Oil Company.

That S. Hamilton Graves, Esq., be paid ten per cent. of the first \$5,000 and five per cent. of the balance of principal and interest of the claim of First National Bank of Baltimore.

That Messrs. Watts, Robertson & Robertson be paid ten per cent. of the first \$5,000, five per cent. of the next \$5,000 and three per

cent. of the balance of the claim of Virginia Iron, Coal & Coke Company.

That Messrs. Cocke & Glasgow be paid ten per cent. of the principal and interest of the claim of the West End Supply Company.

HENRY C. McDOWELL.

Decree of Court.

Entered January 14th, 1904.

United States District Court, Western District of Virginia, at Lynchburg.

In re C. R. BAIRD, Bankrupt,
and

In re ROANOKE FURNACE COMPANY, Bankrupt.

These causes having been argued by counsel, upon consideration thereof it is adjudged, ordered and decreed as follows:

1st. That for reasons stated in a written opinion, the demurrer of the attaching creditors to the petition of Wm. H. Staake, trustee, be, and the same is hereby, overruled.

2nd. And the attaching creditors having by leave of court filed their answer to said petition, to which the said trustee replied generally, it is further adjudged, ordered and decreed:

That the rights acquired by the attachment proceedings in the hustings court of the city of Roanoke by the attaching creditors, to-wit: the Virginia Iron, Coal & Coke Company; Huff, 25 Andrews and Moyler Company; Nelson & Myers; Smith & King; Castner, Curran & Bullitt; Fairfax & Bell; Central Manufacturing Company; Standard Oil Company; West End Supply Company, and the First National Bank of Baltimore, be preserved for the benefit of the estate of the said C. R. Baird, bankrupt, and that said petitioner, Wm. H. Staake, trustee of the said estate, be, and he is hereby, subrogated to said rights, and authorized and empowered to enforce the said attachment liens with like force and effect as the said attaching creditors might have done had not the bankruptcy proceedings intervened.

3rd. Without at this time deciding or considering any other question, it is further adjudged, ordered and decreed that Wm. H. Staake trustee, and John N. M. Shimer, trustee, are directed to collect the funds heretofore deposited by them under the agreement, known as the agreement No. 1, and to pay over the same to the said Wm. H. Staake, trustee, to be by him held subject to the orders of this court.

4th. And upon the hearing of the petition of counsel for the attaching creditors, and the demurrer of Staake, trustee, thereto, it is ordered that the said demurrer be, and it is hereby, overruled, and

the said trustee having answered said petition, upon consideration of the arguments of counsel and for reasons set forth in a written opinion, it is hereby ordered that the said trustee pay to Messrs. Scott & Staples ten per cent. of the first \$5,000 and five per cent. of the balance, if any, of the aggregate of principal and interest of the claims of Huff, Andrews & Moyler Company; Nelson & Myers; Smith & King; Castner, Curran & Bullitt and Central Manufacturing Company.

To A. B. Coleman, Esq., ten per cent. of the aggregate of principal and interest of the claims of Fairfax & Bell and Standard Oil Company.

To S. Hamilton Graves, Esq., ten per cent. of the first \$5,000 and five per cent. of the balance of principal and interest of the claim of First National Bank of Baltimore.

To Messrs. Watts, Robertson & Robertson ten per cent. of the first \$5,000, five per cent. of the next \$5,000 and three per cent. of the balance of the claim of the Virginia Iron, Coal & Coke Co.

That Messrs. Cocke & Glasgow be paid ten per cent. of the principal and interest of the claim of West End Supply Company.

5th. It is further ordered that the trustee will make no disbursements under this order until ten days from the entry hereof shall have elapsed.

26 MEMORANDUM.—Whereas some or all the parties may appeal from, or petition for revision of, some part or all of the foregoing decree, it is further ordered that in the event any party shall, within ten days from this date, appeal from, or petition for revision of, any part of this decree, such part of such decree shall be superseded pending the adjudication by the appellate court.

HENRY C. McDOWELL, Judge.

Enter Jan'y 14, 1904.

Clerk's Certificate.

UNITED STATES OF AMERICA, }
Western District of Virginia, } ss:

I, William McCauley, clerk of the district court of the United States for the western district of Virginia, at Lynchburg, do hereby certify that the foregoing are true copies of proceedings had and certain papers filed in the matters of C. R. Baird, trading as C. R. Baird & Co., bankrupt, and the Roanoke Furnace Company, bankrupt, pending in said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Lynchburg, in said district, this 1st day of February, A. D., 1904, and in the 112th year of the Independence of the United States of America.

[Seal of the Court.]

WM. McCAULEY, Clerk.

Cost of transcript of record \$13.10.

Demurrer to Petition.

Filed Feb. 8, 1904.

In the United States Circuit Court of Appeals, Fourth Circuit.

In re C. R. BAIRD, Trading as C. R. Baird & Co., Bankrupt. In
Bankruptcy.
and

In re ROANOKE FURNACE COMPANY, Bankrupt. In Bankruptcy.

The demurrer of William H. Staake, trustee of C. R. Baird, trading as C. R. Baird & Company, bankrupt, to the petition for review filed by the First National Bank of Baltimore, Md., on the 22d day of January, 1904.

27 This defendant by protestation, not confessing or acknowledging any or all of the matters and things in the said petition contained, to be true in such manner and form as the same are therein set forth and alleged, doth *doth* demur to the said petition; and for causes to demur sheweth:

That said petition is not sufficient in law; it appearing by the plaintiff's own showing by the said petition that it is not entitled to the relief prayed for by the petition against this defendant; wherefore, and for divers other good causes of demurrer appearing on the said petition, this defendant doth demur thereto, and he prays the judgment of this honorable court whether he shall be compelled to make any answer to the said petition, and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

S. GRIFFIN,

Solicitor and of Counsel for the Defendant, William H. Staake, Tr. of C. R. Baird, Trading as C. R. Baird & Company.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

S. GRIFFIN,

Of Counsel for Defendant, Wm. H. Staake, Tr. of
C. R. Baird, Trading, as C. R. Baird & Company.

The affidavit that the above demurrer is not interposed for delay is hereby waived.

S. HAMILTON GRAVES,
Att'y for Petitioners.

Filed Feb. 8, 1904.

In the United States Circuit Court of Appeals, Fourth Circuit.

In re C. R. BAIRD, Trading as C. R. Baird & Co., Bankrupt. In Bankruptcy.

and

In re ROANOKE FURNACE COMPANY, Bankrupt. In Bankruptcy.

The answer of William H. Staake, trustee of C. R. Baird, trading as C. R. Baird & Company, to the petition of the First National Bank of Baltimore *et als.*, respectfully shows to this court:

1. That this respondent has lately exhibited and filed in the district court of the United States for the western district of Virginia, his petition against the said First National Bank of Baltimore *et als.*, upon which petition and the proceedings thereunder the decree complained of in the petition for revision was had.

Respondent further says that all and singular the allegations in said petition of respondent as therein made are true, and that respondent refers to the same, and makes the same and the allegations thereof a part of this answer, the same as if fully set out and incorporated herein.

2. Respondent further says, that the facts of this case are all matters of record, and that so far as said petition sets out the facts as contained in the record, he admits them to be true, but so far as there is any variance, respondent denies that the facts set out in said petition for revision are true.

And now having fully answered, he prays to be hence dismissed.

WM. H. STAAKE,

Trustee of C. R. Baird, Trading as C. R. Baird and Co.,

By COUNSEL.

S. AND U. GRIFFIN, P. D.

29 Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit.

FIRST NATIONAL BANK OF BALTIMORE, Petitioner,

vs.

WILLIAM H. STAAKE, Trustee of C. R. Baird & Company, Bankrupt, *et al.*, Respondents.

} No. 532.

On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Western District of Virginia, Lynchburg.

Jan. 22, 1904, petition to superintend and revise is filed, and the cause is docketed.

Same day, copy of petition, with notice to respondents to answer,

demur or move to dismiss within fifteen days mailed to S. Griffin, attorney for respondents.

Feb. 3, 1904, transcript of record is filed.

Feb. 8, 1904, demurrer to petition is filed.

Same day, answer to petition is filed.

March 16, 1904, 20 copies of printed record are filed.

May 12, 1904 (May term, 1904), cause came on to be heard and is argued before Judges Goff, Morris and Purnell, and submitted.

Nov. 15, 1904, (November term, 1904), the court announced and filed its opinion, which is as follows, to-wit :

30

Opinion.

Filed Nov. 15, 1904.

United States Circuit Court of Appeals, Fourth Circuit.

RECEIVERS OF THE VIRGINIA IRON, COAL AND COKE CO.	}	No. 531.
<i>et al.</i> , Petitioners,		
<i>vs.</i>		
WILLIAM H. STAAKE, Trustee of C. R. Baird & Co., Bank-	}	
rupt, <i>et al.</i> , Respondents.		

FIRST NATIONAL BANK OF BALTIMORE, Petitioner,	}	No. 532.
<i>vs.</i>		
WILLIAM H. STAAKE, Trustee of C. R. Baird & Co., Bank-		
rupt, <i>et al.</i> , Respondents.	}	

WILLIAM H. STAAKE, Trustee of C. R. Baird & Co., Bank-	}	No. 533.
rupt, <i>et al.</i> , Petitioners,		
<i>vs.</i>		
J. ALLEN WATTS, WILLIAM GORDON ROBERTSON, and	}	
Edward W. Robertson <i>et al.</i> , Respondents.		

Petitions to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Western District of Virginia, at Lynchburg. In Bankruptcy.

31 WILLIAM H. STAAKE, Trustee of C. R. Baird &	}	No. 538.
Co., Bankrupt,		
<i>vs.</i>		
WATTS, ROBERTSON & ROBERTSON, A. B. COLEMAN, S. H.	}	
Graves, Scott & Staples, and Cocke & Glasgow.		

Cross-appeals from the District Court of the United States for the Western District of Virginia, at Lynchburg.

(Argued May 12 and 13, 1904; Decided Nov. 15, 1904.)

Before Goff, Circuit Judge, and Morris and Purnell, District Judges.

Wm. Gordon Robertson, S. Hamilton Graves and A. P. Staples for petitioners, and Arthur G. Dickson, Samuel & M. Griffin, John

Dickey, and Samuel W. Cooper for respondents in 531 and 532; Samuel W. Cooper, Samuel & M. Griffin, and Arthur G. Dickson for Staake, trustee; and Wm. Gordon Robertson and A. P. Staples for respondents and appellees in Nos. 533 and 538.

Statement.

The facts in these proceedings have been agreed upon and are as follows:

Chester R. Baird, trading as C. R. Baird & Co., on December 7th, 1899, owned certain real estate in Virginia, known as the West End Furnace property, and as of said date he sold it to the Roanoke Furnace Company, subject to certain existing encumbrances, and executed a contract in writing and received from the Roanoke Furnace Company all the consideration to which he was entitled under the contract, to-wit, shares amounting to \$500,000 of the capital stock of the said Roanoke Furnace Company.

Under the contract of sale the Roanoke Furnace Company took immediate possession in December, 1899, of the property so purchased, but no deed to the company executed by Baird until November 5th, 1900, when a proper deed was executed and promptly recorded. In the meantime, during the month of October, 1900, nine different attachments, amounting to over \$40,000, against
32 Baird as a non-resident of Virginia were issued at the instance of certain of his creditors, and were levied upon the furnace property. Under the provisions of the laws of Virginia, no deed from Baird to the furnace company having been executed and recorded until after the attachments were levied, it is conceded that the attaching creditors acquired as against Baird and the furnace company a lien upon the property so levied upon.

(Code of Virginia, 1887, sections 2463, 2464, 2465, 2472.)

Within four months from the levying of the attachments, to-wit: on December 24th, 1900, an involuntary petition in bankruptcy was filed against Baird in the United States district court for the eastern district of Pennsylvania, and he was adjudged a bankrupt, and on January 2, 1901, the district court of the United States for the western district of Virginia assumed ancillary jurisdiction of so much of the bankruptcy proceedings as related to the property located in Virginia. On December 29, 1900, also within four months from the levying of the attachments, an involuntary petition in bankruptcy was filed against the Roanoke Furnace Company, and such proceedings were had that it was adjudicated a bankrupt. On March 26, 1901, William H. Staake was appointed trustee of the bankrupt estate of C. R. Baird, and on June 29, 1901, John N. M. Shimer was appointed trustee of the bankrupt estate of the Roanoke Furnace Company.

Under orders of court the property conveyed by Baird to the furnace company was sold and the rights and claims of all the parties

were transferred to the fund derived therefrom and all these claims were submitted to the determination of the court below by express consent of all the parties.

Upon the issues made by the petitions and answers the court below ruled that the attachments against Baird, having been obtained through legal proceedings against him, when he was insolvent and within four months prior to the filing of the petition in bankruptcy against him, were null and void under section 67f of the bankruptcy act of 1898, so far as they would give a preference to the attaching creditors, but that the liens should be preserved for the benefit of the bankrupt's estate, and that they should pass to and be preserved by the trustee for the benefit of the estate, and directed that the trustee of the bankrupt estate be subrogated to the rights of the attaching creditors, and authorized and empowered to enforce said attachment liens with like force and effect as the said attaching creditors might have done, had not the bankruptcy proceedings interfered. The

33 district court also ruled that the trustee took these liens to the claim for compensation of the attorneys who procured the attachments and directed that out of the fund derived from the attachments the reasonable fees of the attorneys representing the attaching creditors should be paid. The grounds upon which the learned district judge based his rulings are ably stated in his opinion filed in the case. These two rulings are the subject of the present cross petitions for revision.

MORRIS, district judge, delivered the opinion of the court:

Section 67f provides:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

It cannot be disputed that the liens of the attachments in this case were obtained within four months by legal proceedings against a person who was insolvent, and that the court has on due notice ordered that the right under the attachments shall be preserved for

the benefit of the estate and pass to and be preserved by the trustee for the benefit of the estate. There is therefore in the facts of this case a literal gratification of the words of this section. It is contended, however, that as the first clause of the section makes null and void the liens thereon mentioned and declares that the property affected by the lien shall be wholly discharged and released therefrom and pass to the trustee as part of the estate of the bankrupt, therefore the exception in the latter part of the clause of 67f can have reference only to liens on property, which, if the liens were annulled, would pass to the trustee of the bankrupt released from the lien.

34 We think this is narrowing the more obvious meaning of the words. The wording seems clearly to contemplate that a creditor might obtain by reason of his being a creditor of the bankrupt a prohibited lien against property, which would not if unaffected, pass to the trustee in bankruptcy, and it would appear that it was for that reason the clause in question was inserted preserving the lien if the court should so order for the benefit of the estate and vesting it in the trustee.

A primary object of the bankrupt law is to prevent preferences and compel equality among creditors of the bankrupt, and there can be no doubt that the sequestering of attachment liens, such as those in question in this case, for the benefit of the general creditors does produce equality and prevent preferences.

The rule that the trustee takes the estate of the bankrupt in the same plight as the bankrupt held is not applicable to liens which, although valid as to the bankrupt, are invalid as to creditors. This distinction is clearly stated in the following citation from *In re New York Economical Printing Company*, 110 Fed. Rep., 514, quoted by the Supreme Court of the United States in *Hewitt vs. Berlin Machine Works*, 194 U. S., 302, "The bankrupt act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues. The present act, like all preceeding acts, contemplates that a lien good at that time as against the debtor and as against all his creditors shall remain undisturbed. If it is one which has been obtained in contravention of some provision of the act, which is fraudulent as to creditors, or invalid as to creditors for want of record, it is invalid as to the trustee."

In the present case the sale by the bankrupt was void as against attaching creditors for want of a recorded deed. The property was levied upon by creditors, and by virtue of the attachments might have been sold under judicial process against the bankrupt. The levy was within four months of the filing of the petition in bankruptcy and under section 67f the lien is preserved for the benefit of his estate. In the case of *In re New York Economical Printing Co.*, above cited, Judge Wallace, speaking of the right of a trustee in bankruptcy to treat as invalid a chattel mortgage which was not filed in compliance with the laws of New York, and which, under

the decisions in that State, could be treated as invalid only by creditors who had obtained judgments and acquired a lien, proceeded further to say: "Subdivision *b*, sec. 67 (act of 1898), pre-
 35 serves for the benefit of the estate in bankruptcy, a right which some particular creditor has been prevented from enforcing by the intervention of the debtor's bankruptcy. If a creditor by an execution, or a creditor's bill, has secured a legal or equitable lien upon mortgaged property before the mortgagor has been adjudicated a bankrupt, under this provision his rights will or will not inure to the benefit of the estate, depending upon the time when the lien was acquired. If acquired more than four months before the commencement of the bankruptcy proceedings, his lien would inure to his own exclusive benefit; but if acquired at any time within four months it would be null and void under subdivision '*f*' of the section, except as preserved for the benefit of the estate as provided in that subdivision and in subdivision '*b*.'"

It is urged that by giving to the trustee of the bankrupt's estate the benefit of the attachments the court is taking from the attaching creditors property which did not belong to the bankrupt and could not have passed to his trustee, but which was a right which the law of Virginia, because of a policy of its own, gave to the creditors in a property which did not in fact belong to the bankrupt.

We think that the Virginia law may well be considered as giving the right to the attaching creditor because *quoad* the attaching creditor the law regards the property so attached as to that extent still remaining the property of the bankrupt because of the want of a proper recorded evidence of transfer, and that it is because the law considers the furnace property to that extent as remaining the property of Baird that the attachments are liens at all.

We consider the language of section 67f so mandatory and imperative that we arrive at the conclusion that the ruling of the court below must be sustained.

The other question is as to the allowance of a reasonable compensation to the attorneys who represented the attaching creditors and whose proceedings produced the fund which now is to pass to the trustee of the bankrupt.

The attaching creditors, in good faith and in a justifiable exercise of the right given to them by the Virginia law, employed counsel to institute proceedings to seize the property which the bankrupt, as it now appears, had sold. By virtue of that seizure and solely by virtue of it, and to the extent of the seizure, the proceeds of those proceedings now pass to the trustee.

The equity of the claim for compensation to be paid out of the fund is very strong.

It is clearly a case in which by an appropriation which the bankrupt law makes of a fund which came into existence and was
 36 preserved by the legal proceedings instituted by the attaching creditors all the common creditors without distinction are

benefited. The fund which otherwise the attaching creditors would have secured for their own benefit the bankrupt law says shall be shared equally among all the creditors.

The fund was brought into existence by the exertions of the attaching creditors, and should be considered as in the same class as a fund arising under a creditors' bill, because the bankrupt act declares it shall be so treated. The fund comes into the hands of the trustee of the bankrupt burdened with the charges which were necessarily incurred to bring it into existence. It would appear eminently proper in such a case that the bankruptcy court should in its discretion allow such reasonable counsel fees and expenses as were necessarily incurred in the prosecution of the suits.

Trustees vs. Greenough, 105 U. S., 527-534.

The court below carefully considered the amounts proper to be allowed, and with all the facts before it fixed the allowances. We do not find that injustice has been done either to the counsel of the attaching creditors or to the estate of the bankrupt, and we approve the allowances as fair and just.

The orders of the court below are *affirmed*.

PURNELL, district judge, dissenting:

I cannot concur in the foregoing opinion. Upon the facts agreed and the law stated, it is evident to my mind that Congress did not mean by section 67f of the bankruptcy act of 1898, to provide for the maintenance or preservation of liens such as those set out in this case. If the attachments were void no lien was acquired thereunder, and if void for one purpose they were void for all purposes. They were not in favor of the bankrupt, but for debts due by him, and I cannot agree that even under the act of Congress a court of bankruptcy can convert a debt or liability into an asset. The trustee under the bankrupt law takes only such property as the bankrupt is entitled to. He was not only entitled to nothing under these attachments, but he was the debtor whose property was attached.

And as to the other question, to-wit: the allowance of reasonable compensation to attorneys who represented attaching creditors and whose proceedings produced the fund, if the fund is to be retained in the bankrupt court, I concur in the opinion that there should be allowance of reasonable compensation, but as to the other question I most respectfully dissent.

37 & 38 Nov. 18, 1904, (same term), the court made and entered the following judgment, to-wit:

Judgment.

Filed Nov. 18, 1904.

United States Circuit Court of Appeals, Fourth Circuit.

FIRST NATIONAL BANK OF BALTIMORE, Petitioner,	} No. 532.
vs.	
WILLIAM H. STAAKE, Trustee of C. R. Baird & Company, Bankrupts, <i>et al.</i> , Respondents.	

On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Western District of Virginia, at Lynchburg.

This cause came on to be heard upon the petition, demurrer, answer and the transcript of the record of the proceedings of the district court of the matter for review, and was argued by counsel and submitted.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said district court, in the matter brought up for review, be, and the same is hereby affirmed, costs will be paid by said trustee.

It is further ordered, that the clerk of this court transmit a copy of this judgment to the said district court forthwith.

NATHAN GOFF.

Nov. 18, 1904.

Nov. 22, 1904, mandate stayed until Dec. 10, 1904, to allow petitioner time to present petition for a rehearing.

39 Petition for a Rehearing.

Filed Dec. 9, 1904.

In the United States Circuit Court of Appeals, Fourth Circuit.

Petition for Rehearing.

Filed by First National Bank of Baltimore.

FIRST NATIONAL BANK OF BALTIMORE, Petitioner,	} No. 532.
vs.	
WM. H. STAAKE, Trustee of C. R. Baird & Co., Bankrupt, <i>et al.</i> , Respondents.	

To the honorable judges of the United States circuit court of appeals for the fourth circuit:

Your petitioner, with all deference to the court, most respectfully asks that it be granted a rehearing upon the record herein, and upon

the majority opinion rendered November 15th, 1904, and that the decree entered on November 15th, 1904, be annulled, and that in lieu thereof, a decree be entered in conformity with the prayer of the original petition filed in this court.

In addition to the severe consequence to petitioner (the total loss of its debt; this is the necessary result, since the claims proven as shown by the original record exceed fourteen hundred thousand dollars, exclusive of interest, and petitioner is advised that the other property of the bankrupt, to-wit, that located in the States of
40 New York, Pennsylvania and New Jersey, has been sold for a comparatively small sum to a combination of the larger creditors), the effect of the majority opinion is so far-reaching, standing, as it does, without a precedent, and by the construction given to section 67-F, makes Congress exceed the power conferred upon it by the Constitution, and over-rides a rule of law settled and established by the United States Supreme Court, and upon the question of "what constitutes a preference," is in direct conflict with the opinion of the circuit court of appeals of the eighth circuit, your petitioner respectfully urges that it be reheard and assigns the following grounds:

1st. The opinion ignores the effect of the most pertinent facts of this case, to-wit: That C. R. Baird sold the furnace property on December 7th, 1899, by a contract valid as to him and his general creditors; and that he executed a deed to the Roanoke Furnace Company, dated November 5th, 1900, and which was recorded on the 7th day of November, 1900.

2nd. The construction placed upon section 67-F, is erroneous; and, if correct, makes the bankruptcy act exceed the constitutional limitations placed upon Congress, extends its operation beyond the limits fixed by the Supreme Court, and results in unreasonable consequences.

3rd. Upon the question of "what constitutes a preference," as that term is used in the bankruptcy act, the opinion is in direct conflict with the opinion of the circuit court of appeals of the eighth circuit.

As to the first ground: The court, fully appreciating the fact that under the terms of the bankruptcy act, and in conformity with the decisions thereunder, in order to sustain the contention of the trustee, it must first ascertain that the attached property was that of the bankrupt, as of the date the petition was filed against him, on page 6 of its opinion, says:

"We think that the Virginia law may well be considered as giving the right to the attaching creditors, because *quoad* the
41 attaching creditor, the law regards the property so attached as to that extent still remaining the property of the bankrupt, because of the want of proper recorded evidence of transfer, and that it is because the law considers the furnace property to that extent as remaining the property of Baird, that the attachments are liens at all."

This is unquestionably correct prior to, but not subsequent to,

November 7th, 1900, since as of that date every vestige of interest, legal or equitable, because of the record of a valid deed, passed from Baird, and under the laws of Virginia, neither he, or any one claiming under him, or any creditor of his, either had or could acquire, any interest therein, or lien thereon, because of his previous ownership.

The proposition that, a lien upon property, to the extent of its amount, preserves an ownership in that property, in the debtor, as against his subsequent valid deed, for a full and fair consideration, is to us incomprehensible. Such a rule of law would, as was in effect said by the dissenting judge, "convert a liability into an asset." It would create a new and novel form of ownership, neither founded in reason, or sustained by authority. Suppose, for instance, that the Roanoke Furnace Company had on November 7th, 1900, the date it recorded its deed (which was nearly two months prior to the date the petition was filed against Baird), paid to petitioner the amount of its lien, dissolved the attachment, released the *lis pendens*, and dismissed the suit; could it have been successfully contended in any court, then, or at any subsequent time, by any person whatsoever, that petitioner had disposed of, and the Roanoke Furnace Company, in so doing, had purchased an asset or property belonging to Baird? Unquestionably not. The lien was petitioner's, and the property was that of the Roanoke Furnace Company, and had been for over a year prior to the filing of the petition against Baird.

We are, with all respect to the court, forced to the belief, that it, when considering this case, either lost sight of the contract
42 of purchase and sale dated December 7th, 1899, and of the deed of November 5th, 1900, or failed to appreciate the force and effect of these instruments under the laws of Virginia. Under the laws of this State, the ownership of the furnace property passed under the written contract from Baird on December 7th, 1899. The written contract was valid as to Baird, and as to his general creditors, and was void only as to his lien creditors, as was admitted by respondent counsel during the oral argument.

As to the second ground: The construction placed upon sec. 67-F, is erroneous; and if correct, makes the bankruptcy act exceed the limitations placed on Congress by the Constitution, and extends the operation of the act beyond the limits fixed by the Supreme Court, and results in most unreasonable consequences. It is submitted that in construing the various provisions of the bankruptcy act, it must be constantly borne in mind, that the act deals only with the estate of the bankrupt; that the prohibitions, restrictions and remedies therein provided for, have reference solely and exclusively to the bankrupt's property, and that rights become vested as of the date the petition is filed.

Aside from the cases cited in the brief, the attention of the court is called to *Pierie vs. Chicago Title & Trust Company*, 182 U. S., 449; 45 Law Ed., 1178, in which the court used this language:

"It is hardly necessary to assert that the object of a bankruptcy act,

so far as its creditors are concerned, is to secure equality of distribution among them of *the property of the bankrupt.*"

Mr. Justice Catron, in the case *Re Klein*, which is cited and approved in *Hanover National Bank vs. Moyses*, 186 U. S., 185; 46 Law Ed. 1118, in discussing the constitutional provision for a national bankrupt act, said:

"Of this subject (bankruptcy) Congress has general jurisdiction; and the true inquiry is: To what limits is that jurisdiction
43 restricted? I hold it extends to all cases where the law causes to be distributed *the property* of the debtor among his creditors. This is its least limit."

Mr. Chief Justice Waite, in the case *In re Deckert*, which case was cited and approved in *Hanover National Bank vs. Moyses*, *supra*, when discussing the constitutional requirement of uniformity of the bankrupt act, used this language:

"But it has thus far been sustained for the reason that it was made a rule of the law to subject to the payment of debts under its operations, only such property as could by judicial process be made available for the same purpose. * * * One of the effects of a bankrupt law is that of a general execution issued in favor of all the creditors of the bankrupt, reaching all his property subject to levy, and applying it to the payment of all his debts according to their respective priorities. *It is quite proper, therefore, to confine its operation to such property as other legal process could reach.*"

In the case of *Hewitt vs. Berlin Machine Works* (194 U. S., 302), cited by this court in its opinion, p. 5, the limitations of the act *was* clearly defined when the court used this language:

"The bankrupt act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt, or to his creditors at the time when the trustee's title accrues."

We take it, that in construing sec. 67-F, the court must be bound by the principles above established; that is, that the only lien which can be affected by that section, is a lien which is upon property which can pass to the trustee of the bankrupt; that is, confine its operation to such property as other process could reach as of the date the petition was filed. This court in its opinion, on page 5, says:

"The wording seems clearly to contemplate that a creditor
44 might obtain, by reason of his being a creditor of the bankrupt, a prohibited lien against property which would not, if unaffected, pass to the trustee in bankruptcy, and it would appear that it was for that reason the clause in question was inserted, preserving the lien, if the court should so order, for the benefit of the estate, and vesting it in the trustee."

By this construction, the act is made to deal with the property of a third party; it imposes a penalty upon a creditor of a bankrupt, by reason of the fact that he is such creditor, and not by reason of any effect which his procuring of a lien upon the property of a third party, may have had upon the estate of the bankrupt. It

brings into the estate, as an asset, the proceeds from a lien not upon that estate, and one which no process from any court—State or Federal—could have reached as of the date the petition was filed. Such construction, in effect, and in fact, in the case at bar, creates an asset. Assume, for the purpose of illustration, that no sale has yet been made of the furnace property by the Federal court; that under the decree in this case, Staake, trustee, applied to the hustings court of Roanoke city, and was made plaintiff in petitioner's attachment suit there pending; that the Roanoke Furnace Company then appeared and filed its plea, setting up the covenants contained in the deed of November 5th, 1900, from Baird to it. The only replication to such a plea must be, that the trustee is not enforcing the lien because of any interest then, or ever had therein, by the bankrupt grantor, but because of a property right created in the trustee by sec. 67-F of the bankruptcy act. If the trustee was proceeding because of any right or interest which may have existed in the bankrupt, it must defeat the attachment lien, for no one can enforce a lien against his solemn covenant in an instrument under seal.

It is submitted that the proposition involved in the above quota-
tion, to-wit, that there may be a prohibited lien against property
which would not, if unaffected, pass to the trustee in bankruptcy—
is a pioneer. After a most careful search, we have been
45 unable to find any decision of any court, which held that the
bankrupt act avoided a lien on any property whatsoever,
other than that of the bankrupt which passed to his trustee. It is
submitted that the real and true purpose of sec. 67-F, was to procure
equality of distribution of a bankrupt's *assets* among his creditors
without preference. An apt illustration of the beneficial effect
of the provision quoted, is to be found in the case *In re Economical
Printing Co.*, which is cited in the opinion, and reported in 110
Fed. Rep., p. 514. In that case, the printing company had mort-
gaged certain property. Because of the mortgagee's failure to comply
with the registry laws of the State of New York, it was contended
that the property passed to the trustee free and discharged from
the mortgage. This proposition, however, was denied by the court.
The mortgaged property, of course, passed to the trustee. A lien
had been secured upon that property within the prohibited period
of four months. The court held, and very properly held, that the
trustee was entitled to the benefit of that lien. Now this presents
a case where the lien was taken from the creditor; since the mortgage
was held valid, *quoad* the trustee, it would appear that the same
results would have been secured to the estate by simply avoiding
the judgment lien, as was secured by subrogating the trustee.

We wish to illustrate to the court, a case which might arise, in
which the right to preserve the lien would be of material benefit to
the estate, and thereby demonstrate the true purpose of the provision
in question.

Under the laws of Virginia, in a suit to set aside a fraudulent con-

veyance, priority is given, not to the first creditor who institutes his suit for that purpose, but to the first creditor who, after instituting his suit, files and causes to be recorded a *lis pendens*. Now, to illustrate: In June a creditor filed a bill to set aside as fraudulent a deed made by his debtor, but he does not record the *lis pendens* provided by statute. In September another creditor files his bill for 46 the same purpose, and does record his *lis pendens*. In November the deed is declared null and void, and in December the debtor is adjudged a bankrupt, and the property so fraudulently conveyed passes to his trustee. The word "creditor" in Virginia, means lien creditor, and hence it is not necessary, under the act, that the plaintiff filing his bill in June, should have filed a *lis pendens* as to the general creditors of his fraudulent debtor. Therefore, his lien being four months anterior to the adjudication of bankruptcy, is unaffected by the bankrupt laws, and is valid as against the general creditors of the debtor. The lien of the second petitioning creditor being within four months of the filing of the petition, is void under the bankrupt law. Now comes the beneficial effect of the preservative provision in clause "F:" The first lien is valid under the bankrupt law, and is valid as against the general creditors of the debtor, but there being no *lis pendens* recorded, it is void as to the lien of the second creditor. The lien of the second creditor, having his *lis pendens*, is anterior under the State laws, to the lien of the first creditor, but is void under the four-months clause of the bankrupt law. Should the court preserve the lien of the second creditor, it preserves the priority of that lien, and thus preserves for the general creditors that much of the assets of the bankrupt which would have gone to the first creditor instituting the suit, and in the event the property was not more than sufficient to have satisfied his claim, would have taken the entire estate. Thus, a lien otherwise void, is preserved by the court for the benefit of the general creditors.

We call the attention of the court to the quotations on page 6 of the opinion filed, wherein this language is quoted:

"Sub-division *b*, sec. 67 (act of 1898) preserves for the benefit of the estate in bankruptcy, a right which some particular creditor has been prevented from enforcing by the intervention of the debtor's bankruptcy:"

47 and that in the case at bar, the intervention of the debtor's bankruptcy in no way affected the status of the Roanoke Furnace property, nor did it prevent any particular creditor from enforcing a right. The general creditors of Baird were prevented from acquiring any rights by the recordation of the deed of November 5th, 1900, nearly two months prior to the date the petition was filed against Baird. The court says, on page 5 of its opinion:

"The property which was levied upon by creditors, and by virtue of the attachments, might have been sold under judicial process against the bankrupt."

It is most respectfully submitted that while the bankrupt was a necessary party to the suit, yet the suit was not to sell property which belonged to the bankrupt, and consequently, it could hardly be said that it was sold under judicial process against him, within the meaning of the bankruptcy act. As we construe it, this suit was no more a process against Baird, than it would have been had it been to foreclose an ordinary deed of trust in which he appeared as trustee. His interest in the furnace property was gone: it passed from him more than a year before, and the only defense which he could have made in the suit, had he entered an appearance, would have been to question the correctness of the debt.

Third ground. Upon the question of "what constitutes a preference," as that term is used in the bankruptcy act, the opinion of this court is in direct conflict with the opinion of the circuit court of appeals of the eighth circuit. This court in its opinion at page 5, says:

"A primary object of the bankrupt law is to prevent preferences, and compel equality among creditors of the bankrupt, and there can be no doubt that the sequestering of attachment liens, such as those in question in this case, for the benefit of the general creditors, does produce equality, and prevents preferences."

48 That the property attached in the case at bar was not estate of the bankrupt, which could pass to his trustee, is not questioned. The attachment, if enforced, will not be paid out of the estate of the bankrupt, or out of a fund produced by a sale of his estate. A preference, if petitioner's attachment was not sequestered, but was left to it, would not be created unless this court construed the word "preference," as used in the act, to mean equal percentage of payment to each creditor, regardless of the source from which the fund might be derived, with which such payment might be made. Such a construction of a preference is in direct conflict with the construction given by the circuit court of appeals of the eighth circuit, in the case of *Swartz vs. Fourth National Bank*, 117 Federal Rep., page 1. In that case, at page 7, the court said:

"The test of a preference, as we have seen, is whether or not a transfer or payment will have the effect to pay on one claim a larger dividend *out of the estate of the bankrupt than that estate will pay on other claims of the same class*. It is its effect upon the *equal distribution of the estate of the bankrupt*, not its effect up- the creditor, that determines the preference." * * *

"Those creditors who are entitled to receive out of the estate of the bankrupt the same percentage of their claims are in the same class, however much their owners may have the right to collect from others than the bankrupt. *Their relations to third parties, their right to collect of others*, the personal security they may have, their endorsements or guaranties, receive no consideration, no thought. *It is the relation of their claims to the estate of the bankrupt, the percentages their claims are entitled to draw out of the estate of the bankrupt*, and these

alone, that dictate the relations of the creditors to the estate, and fix their classification and their preferences."

The payment of petitioner's attachment to it can work no 49 & 50 diminution of the bankrupt's estate. The property upon which the attachments were levied was sold by Baird on December 7th, 1899,—more than a year prior to the filing of the petition in bankruptcy against him, and he received all the consideration to which he was entitled.

In the case *In re* New York Economical Printing Co., hereinbefore referred to and cited by this court, it was held that the trustee stood in the shoes, so to speak, of the bankrupt, and that a mortgagee who had failed to comply with the registry laws of the State of New York, had a valid prior lien upon the mortgaged property *quoad* the trustee; then how can it be possibly questioned, under this authority, but that a purchaser for value, who for a time only, fails to comply with the registry laws of Virginia, has a right of property superior to the trustee? We submit that under this authority, the Roanoke Furnace property, even though no deed had ever been recorded, would not have passed to Baird's trustee. Then, certainly, with a deed admittedly valid and properly recorded, by no possibility could anything pass to the trustee.

Your petitioner most respectfully urges that it be given a rehearing, and that, thereupon such decree may be entered as will give to your petitioner the sole benefit of its attachment lien.

Respectfully,

FIRST NATIONAL BANK OF BALTIMORE,
By S. HAMILTON GRAVES, Counsel.

I, S. Hamilton Graves, a practising attorney in the United States circuit court of appeals for the fourth circuit, do hereby certify that, in my opinion, a rehearing should be granted as asked for in the foregoing petition, and upon the grounds therein stated, and that a decree should be entered giving to petitioner the benefit of its attachment lien.

Given under my hand this 5th day of December, A. D. 1904.

S. HAMILTON GRAVES.

51 Same day, to-wit: Dec. 9, 1904, mandate is stayed pending petition for a rehearing.

Order Denying a Rehearing.

Filed Feb. 7, 1905.

United States Circuit Court of Appeals, Fourth Circuit.

FIRST NATIONAL BANK OF BALTIMORE, Petitioner,	} No. 532.
<i>vs.</i>	
WILLIAM H. STAAKE, Trustee of C. R. Baird & Co., Bankrupts, <i>et al.</i> , Respondents.	

On Petition for Review, &c., of the District Court of the United States for the Western District of Virginia.

This court, having at its November term, 1904, rendered its decision affirming the judgment of the district court in this cause, and the petitioner, by its attorney, having on December 9, 1904, presented to the court a petition for a rehearing of the cause.

It is now here ordered, by this court, that the rehearing asked for be, and the same is hereby denied.

NATHAN GOFF,
Circuit Judge, Presiding.

Feb. 7th, 1905.

Feb. 21, 1905, (February term, 1905), mandate stayed 30 days to allow petitioner to file its application in the supreme court for a writ of certiorari.

52

Clerk's Certificate.

UNITED STATES OF AMERICA, } ss:
Fourth Circuit,

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause as the same remains upon the records and files of the said circuit court of appeals.

In testimony whereof I hereto set my hand and affix the seal of the said United States circuit court of appeals, fourth circuit, this 10th day of March, A. D., 1905.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

53 United States Circuit Court of Appeals, Fourth Circuit.

UNITED STATES OF AMERICA, ss:

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do make return to the annexed writ of certiorari issued out of the Supreme Court of the United States in the cause therein entitled on the 12th day of April 1905, by annexing hereto a certified copy of the stipulation of the attorneys of record, that the transcript already filed in the clerk's office of the Supreme Court of the United States, with the petition for the writ of certiorari, be taken, as a return to said writ, dated the 14th day of April A. D. 1905.

In testimony whereof I hereto set my hand and affix the seal of the said circuit court of appeals on this 17th day of April A. D. 1905.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeal-
for the Fourth Circuit.

54 United States Circuit Court of Appeals for the Fourth Circuit.

FIRST NATIONAL BANK OF BALTIMORE, Petitioner,

vs.

WM. H. STAAKE, Trustee of C. R. Baird, Trading as C. R. Baird & Co., Respondent. } No. 532.

It is hereby stipulated that the transcript already filed in the clerk's office of the Supreme Court of the United States, with the petition for the writ of certiorari, be taken as a return to said writ, dated the 14th day of April A. D. 1905.

S. HAMILTON GRAVES,
Counsel for First National Bank of Baltimore.
S. & M. GRIFFIN,
Of Counsel for W. H. Staake, Trustee.

UNITED STATES OF AMERICA, ss:

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit do certify that the above stipulation of counsel is a true copy of the original filed April 17, 1905, and now remaining among the records and proceedings in the therein entitled cause.

In testimony whereof I hereto set my hand and affix the seal of the circuit court of appeals, at Richmond, on this 17th day of April, A. D. 1905.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, 4th Ct.

55 UNITED STATES OF AMERICA, ss :

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fourth circuit, Greeting :

Being informed that there is now pending before you a suit in which First National Bank of Baltimore is petitioner and William H. Staake, trustee of C. R. Baird, trading as C. R. Baird & Company, is respondent, No. 532, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into
56 the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 12th day of April, in the year of our Lord one thousand nine hundred and five.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

57 [Endorsed :] File No. 19,683. Supreme Court of the United States. No. 583, October term, 1904. First National Bank of Baltimore vs. Wm. H. Staake, trustee &c. Writ of certiorari. The execution of the within writ appears from certain schedules thereto annexed Henry T. Meloney cl'k U. S. C. C. appeals April 17, 1905

58 [Endorsed :] File No. 19,683. Supreme Court U. S., October term, 1904. Term No. 582. First National Bank of Baltimore vs. Wm. H. Staake trustee, &c. Writ of certiorari and return. Filed April 18, 1905.